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Nos. 1320-1321

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

AMERICAN BONDING COMPANY OF BALTIMORE (a corporation),
Plaintiff in Error,

vs.

WILLIAM FINNEY, Late Sheriff of Blaine County, Idaho,
Defendant in Error.

AMERICAN BONDING COMPANY OF BALTIMORE (a corporation),
Plaintiff in Error,

vs.

J. C. MILLS, Jr., Late Sheriff of Boise County, Idaho,
Defendant in Error.

REPLY BRIEF OF PLAINTIFF IN ERROR.

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Filed this.....day of November, A. D. 1906.
FRANK D. MONCKTON, Clerk.
By.....Deputy Clerk.

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AMERICAN BONDING COMPANY OF BALTIMORE (a corporation), *Plaintiff in Error,* vs. WILLIAM FINNEY, Late Sheriff of Blaine County, Idaho, *Defendant in Error.*	No. 1320
AMERICAN BONDING COMPANY OF BALTIMORE (a corporation), *Plaintiff in Error,* vs. J. C. MILLS, Jr., Late Sheriff of Boise County, Idaho, *Defendant in Error.*	No. 1321

REPLY BRIEF OF PLAINTIFF IN ERROR.

This Court having intimated that it is precluded from considering the merits of the case "by the total lack of jurisdiction of the Circuit Court", we confine ourselves in this reply to the question of jurisdiction.

In the memorandum filed by the Court there appear to be certain inaccuracies as to dates, so that it would seem desirable to state the history of the case in chronological sequence.

May 13, 1904. Complaint filed in State Court (p. 23).

May 17, 1904. Summons served on Bonding Co. (p. 25) and on the supposed agent of the Flato Co. (p. 25).

May 27, 1904. Petition of Bonding Co. alone—for removal (p. 27).

Sept. 22, 1904. Cause remanded (p. 39).

Feb. 4, 1905. Order of State Court quashing service of summons on Flato Co. (p. 53).

Feb. 4, 1905. Second petition of Bonding Co. alone for removal (p. 55).

Feb. 11, 1905. Alias summons served on Flato Co. (p. 79).

Feb. 16, 1905. Petitions for removal filed both by Bonding Co. and Flato Co. (pp. 73, 75).

Feb. 17, 1905. Case tried in State Court, over protest of Bonding Co. (p. 91).

Mar. 6, 1905. Default entered in State Court against Flato Co. (p. 79).

Mar. 13, 1905. Motion to remand (p. 82).

Apr. 4, 1905. Remand denied (p. 93).

It is submitted that it is inaccurate to say that a

Circuit Court does not have jurisdiction of a case, which has been removed into and retained by it, when it is one that might have originally been brought in it. If the controversy is one between citizens of different States, and involves more than $2,000, the Circuit Court does have *jurisdiction.*

On the other hand, the Removal Act imposes certain conditions on the right to remove, that is to say, prescribes the method by which the Federal jurisdiction may be invoked; and these conditions may be insisted on by the plaintiff. They are no affair of the Court, unless the plaintiff invokes its authority and does so seasonably.

It is conceded that the case at bar involves a controversy between citizens of different States, and for more than $2,000. The petition of February 16, 1905, on which the remand was denied, was made by both defendants. It was accompanied by a sufficient bond. The only possible objection to it, therefore, is that it was not filed in time. But that is not a *jurisdictional* matter.

As was said in Martin v. Baltimore Co., 151 U. S. 673,

> "The time of filing a petition for removal is not a fact in its nature essential to the jurisdiction of the National Court like the fundamental condition of a controversy between citizens of different States."

And again in Powers v. Chesapeake Co., 169 U. S. 92, where after a first remand, a second removal was sustained,

> "The time of filing a petition for removal is not essential to the jurisdiction; the provision on that subject is in the words of Justice Bradley 'but modal and formal', and a failure to comply with it may be the subject of waiver or estoppel."

Now then, has the plaintiff ever objected to the removal on the ground that the petition was not filed in time? He certainly made no objection to the trial in the Court below. He enters into a formal stipulation for the waiver of a jury (p. 105) serves notice to produce papers (p. 104) and puts in and argues his case. But we are not left to inference as to his attitude towards the removal, for he states his objections specifically in his motion to remand (p. 81). The grounds of the motion when condensed are found to be only two, viz., that the Circuit Court has no *jurisdiction* and that both defendants did not join in the petition. Both defendants did join, and, according to the definitions of the Supreme Court, the Circuit Court did have jurisdiction. No objection having been made that the petition had not been filed in time, the lower Court properly denied the motion to remand.

The particular objection is made for the first time in the brief of defendant in error in this Court.

> "That the jurisdiction of the Circuit Court over a case removed into it from a State Court,

> cannot be defeated upon the ground that the petition for removal was filed too late, if the objection is not taken until after the case has proceeded to trial in the Circuit Court, has been distinctly decided by this Court."
>
> Martin v. Baltimore Co., 151 U. S. 673.

There is no room to say that the Bonding Company ever acquiesced in the jurisdiction of the State Court. At the time when it was in contemplation of law the only defendant, because it was the only defendant served, it, within the time provided by statute, filed its petition for removal. The cause having been remanded by the Circuit Court, there was nothing left for it to do but to contest the case in the State Court. This is not a "voluntary appearance". But although it was not necessary under these circumstances to do so, the Bonding Company protested against the jurisdiction of the State Court (p. 63) at the very inception of the trial.

However, the Supreme Court in a long line of cases, has decided distinctly that, even before a motion to remand has been made or decided, participation in a trial in the State Court, after filing the removal papers, is no waiver of the right to have the case disposed of in the Federal Court.

> The Removal Cases, 100 U. S. 457;
> Davis v. Fredericks, 104 U. S. 5;
> Oakley v. Goodnow, 118 U. S. 43.

We allow ourselves to call attention to the following statement of the Court, contained in the memorandum filed herein, and which is manifestly an inadvertence. In view of the above considerations, we do not deem the matter one of substance, but refer to it because it seems to have weighed with the Court. The statement is "The Flato Company did not plead to the complaints in the State Court, but on the *13th day* of *March,* 1905, filed therein its petition and bond for removal of the cases to the Court below, prior to which time, according to the affidavit of the counsel for the plaintiff, filed in opposition to the petition, the default of that Company for failure to appear, had been entered and judgment taken against it in the State Court."

The fact is that the Flato Company was first served with process on February 7, 1905, and that before the time to plead had arrived, and on *February 16,* 1905, and not as stated by this Court, on March 13, 1905, it joined with the Bonding Company in a petition for removal (pp. 73, 75).

It is respectfully submitted that this Court should retain jurisdiction and decide the case upon its merits.

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